EUROPEAN COMMISSION

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In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus […].	PUBLIC VERSION This document is made available for information purposes only.

Subject: State aid No C36/2007 – Germany

State aid to Deutsche Post AG

Sir,

The Commission wishes to inform Germany that, after having examined the information supplied by your authorities in relation to the measure mentioned above, it has decided to extend the investigation procedure laid down in Article 108 (2) Treaty on the Functioning of the European Union (hereinafter "TFEU").

I. PROCEDURE AND GROUNDS FOR EXTENSION

I.1. 2002 Decision

1. In 1994 United Parcel Service (hereafter UPS) filed a complaint concerning the granting of unlawful State aid to Deutsche Bundespost POSTDIENST (hereafter POSTDIENST).

Seiner Exzellenz Herrn Dr. Guido WESTERWELLE
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2. Following the opening of proceedings on 23 October 1999[1] (hereafter 1999 Opening Decision), the Commission adopted a final negative decision on 19 June 2002[2] (hereafter 2002 Decision): It was established that POSTDIENST and its successor Deutsche Post AG (hereafter DPAG, whereas POSTDIENST and DPAG will be hereafter jointly referred to as Deutsche Post) priced door-to-door parcels below incremental costs and that this aggressive pricing policy did not to fall within Deutsche Post's universal service obligation. The resulting losses of € 572 million were ultimately financed, in contravention of Articles 106 and 107 TFEU, by the State resources which were granted to Deutsche Post in various forms (e.g. public transfers from sister company Deutsche Bundespost TELEKOM (hereafter TELEKOM), public guarantees for loans, and public financing of civil servants' pension).

3. Following the Commission's order, Germany recovered the incompatible State aid of € 572 million from Deutsche Post. However, on appeal by Deutsche Post, the General Court of the European Union (hereafter GC) rejected in its 2008 judgement[3] the partial approach which the Commission had followed with its 2002 Decision. The GC considered it necessary to proceed instead with a comprehensive analysis of all universal service revenues and costs to determine whether the service provider had been under- or overcompensated. Following Deutsche Post's successful appeal, Germany paid back the recovered State aid of € 572 million plus accrued interest to Deutsche Post.

4. The Commission decided to appeal the GC's judgement. On 2 September 2010, the Court of Justice dismissed the Commission's appeal and upheld the GC's judgement.[4] The 2002 decision has therefore finally been quashed.

I.2. 2007 Opening Decision

5. Following further complaints by UPS and TNT Post AG & Co KG (hereafter TNT), the Commission informed Germany by letter of 12 September 2007[5] (hereafter 2007 Opening Decision) to extend the proceedings which had originally been initiated in 1999. The objective of the 2007 investigation is to comprehensively address all potential distortions of competition which resulted from the public measures that were granted to Deutsche Post.

6. The 2007 Opening decision dealt with the following public measures that were granted to Deutsche Post from 1990 to 2007:

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[1] Invitation of 17 August 1999 to submit comments pursuant to Article 88 (2) of the EC Treaty on aid C 61/99 (ex NN 153/96) – State aid to Deutsche Post AG (OJ C 306, 23.10.1999, p.25).

[2] Commission Decision 2002/753/EC of 19 June 2002 on measures implemented by the Federal Republic of Germany for Deutsche Post AG (OJ L 247, 14.9.2002, p.27).

[3] Case T-266/02 *Deutsche Post AG v Commission* [2008] ECR II-01233.

[4] Case C-399/08 *Deutsche Post AG v Commission* [2010] not yet published.

[5] Invitation of 12 September 2007 to submit comments pursuant to Article 88 (2) of the EC Treaty on aid C 36/07 (ex NN 25/07) – State aid to Deutsche Post AG (OJ C 245, 19.10.2007, p.21).

- Public transfers of € 5,666 m from 1990 to 1995 (hereafter public transfers) and public guarantees for loans (hereafter public guarantees) based on

    - Postverfassungsgesetz 1989[6] (hereafter PostVerfG 1989)

    - Postumwandlungsgesetz 1994 [7] (hereafter PostUmwG 1994)

- Public subsidies of € 27,628 m for civil servants' pensions from 1995 to 2007 (hereafter pension subsidies) based on

    - Personalrechtsgesetz 1994[8] (hereafter PostPersRG 1994)

- Exclusive right for the provision of letter services based on

    - Gesetz über das Postwesen 1989[9] (hereafter PostG 1989)

    - Postgesetz 1997 (hereafter PostG 1997)

7. Based on the Altmark judgement[10], the 2007 opening decision considered that the public transfers and guarantees constituted aid within the meaning of Article 107(1) TFEU. Concerning the public financing of the civil servants' pensions, the 2007 opening decision expressed doubts to which extent the pension subsidies conferred an economic advantage to Deutsche Post.

8. Concerning the compatibility assessment pursuant to Article 106(2) TFEU, the 2007 opening decision expressed doubts whether the public measures granted to Deutsche Post had been necessary for the fulfilment of the universal service obligations, and proportional to this end.

I.3. Grounds for extension

9. Following the 2007 Opening decision, Germany has claimed forcefully that the pension subsidy would not constitute aid in the meaning of Article 107(1) TFEU and if yes should exclusively be investigated as compensation for 'legacy' costs pursuant to Article 107(3)(c) TFEU and not as public service compensation pursuant to Article 106(2) TFEU. Germany has emphasized several times that Article 106(2) TFEU would not be evoked as justification for the pension subsidy.[11]

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[6] Gesetz über die Unternehmensverfassung der Deutschen Bundespost of 8 June 1989 (BGBl. I S. 1026).

[7] Gesetz zur Umwandlung von Unternehmen der Deutschen Bundespost in die Rechtsform der Aktiengesellschaft of 14 September 1994 (BGBl. I S. 2325).

[8] Gesetz zum Personalrecht der Beschäftigten der früheren Deutschen Bundespost of 14. September 1994 (BGBl. I S. 2325).

[9] Gesetz über das Postwesen of 3 July 1989 (BGBl. I S 1450).

[10] Case C-280-00 *Altmark Trans GmbH* [2003] ECR I-07747.

[11] Amongst others, Germany submitted on 27 June 2008 an expert opinion by Prof. Ehlermann on the obligation of the Commission to investigate separately the public transfers, the public guarantees, and the pension subsidy.

10. As the 2007 opening decision only provided a cursory assessment of the pension subsidy, it seems appropriate to investigate more in-depth whether Deutsche Post was burdened with 'legacy' pension costs and to which extent the pension subsidies would be justified under State aid rules in order to achieve fair competition between Deutsche Post and competitors.

11. However, as the following analysis will show, doubts exist concerning Germany's claim that the pension subsidy would be a compatible compensation for 'legacy' pension costs. It must be taken into account that Deutsche Post was not only compensated by the pension subsidy but also by increased regulated letter prices for the allegedly abnormal pension costs. While Germany claims that Deutsche Post had to carry higher pension costs than competitors, an assessment, which takes into account both sources of compensation, yields the opposite result and shows that Deutsche Post effectively benefitted from social contribution rates that were 10 to 15 percent below the rates which competitors had to carry.

I.4. Scope of the extension

12. The following section II will describe the two public measures – the pension subsidies and the increased regulated letter prices – that provided compensation for the civil servants' pension costs. The section III will discuss Germany's comments on the pension subsidy concerning existence of aid and compatibility. The preliminary aid assessment will finally be presented in section IV.

13. Please note that this extension does neither address comments on the 2007 opening decision submitted by third parties nor comments by Germany on the aid nature of public transfers and guarantees as well as the compatibility assessment pursuant to Article 106(2) TFEU.

II. DETAILED DESCRIPTION OF PUBLIC MEASURES TO COMPENSATE DEUTSCHE POST'S PENSION COSTS

II.1. Detailed description of the pension subsidy in the context of the German social insurance scheme

14. The pension subsidy financed after 1995 a major share of the expenses for Deutsche Post's retired civil servants. To fully apprehend the effects of the pension subsidy in the later analysis, the following sections will describe in more detail the system of statutory social insurances for civil servants and compare it to the private employees' regime.

II.1.1. Statutory social insurances for civil servants

15. Civil servants benefit of specific statutory social insurance schemes for old age pensions and health care. The benefits for Deutsche Post's civil servants are equal to the benefits which are granted to all other civil servants:

- The level of the pension is pre-defined, according to Article 14 BeamtVG[12], at a certain percentage of the last salary that the civil servant earns. This means that e.g. a civil servant who retires in 2010 and has worked the required number of years will receive a pension which is equal to 71.75 percent of his last salary.

- 50 to 70 percent of health and long-term care expenses are covered. The exact amount depends on several criteria such as the number of children. The remaining costs have to be borne by the civil servant who can either choose to insure himself with a private or public health insurance or can decide to pay the costs out of his own pocket.

16. As regards the financing of those social benefits, the expenses have to be paid at the moment they occur (e.g. direct payment of pensions to retired civil servants and reimbursement of health expenses). There is no obligation to pre-finance the expected pension expenses as with other private or social insurance schemes when employer and employee pay a monthly insurance fee during working life.

II.1.2. Statutory social insurances for civil servants from 1989 to 1994 at POSTDIENST

17. After the first postal reform of 1989, POSTDIENST, TELEKOM and POSTBANK had, according to Article 54(2) PostVerfG 1989, to fully finance the pension payments and health expenses of the retired civil servants who were allocated to the respective sections on basis of the civil servants' former activities.

II.1.3. Statutory social insurances for civil servants from 1995 to 2007 at DPAG

18. With the second postal reform of 1994, civil servants who had worked for POSTDIENST were, according to Article 2(1) PostPersRG 1994, transferred to DPAG. Thereby, the civil servants kept, according to Article 2(3) PostPersRG 1994, their existing legal status. DPAG took over, according to Article 1(1) PostPersRG 1994, all employer's rights and obligations from the federal State and assumed, according to Article 2(3) PostPersRG 1994 all the civil servants' proprietary claims.

19. According to Article 15 PostPersRG 1994, the payment of pension and health expenses to retired civil servants was taken over by the *"Unterstützungskassen der Post-Aktiengesellschaften"*. On 1st of July 2001 the three existing Postal pension funds were united to the "*Bundes-Pensions-Service für Post und Telekommunikation e.V.*" (hereafter jointly referred to as Postal pension fund).

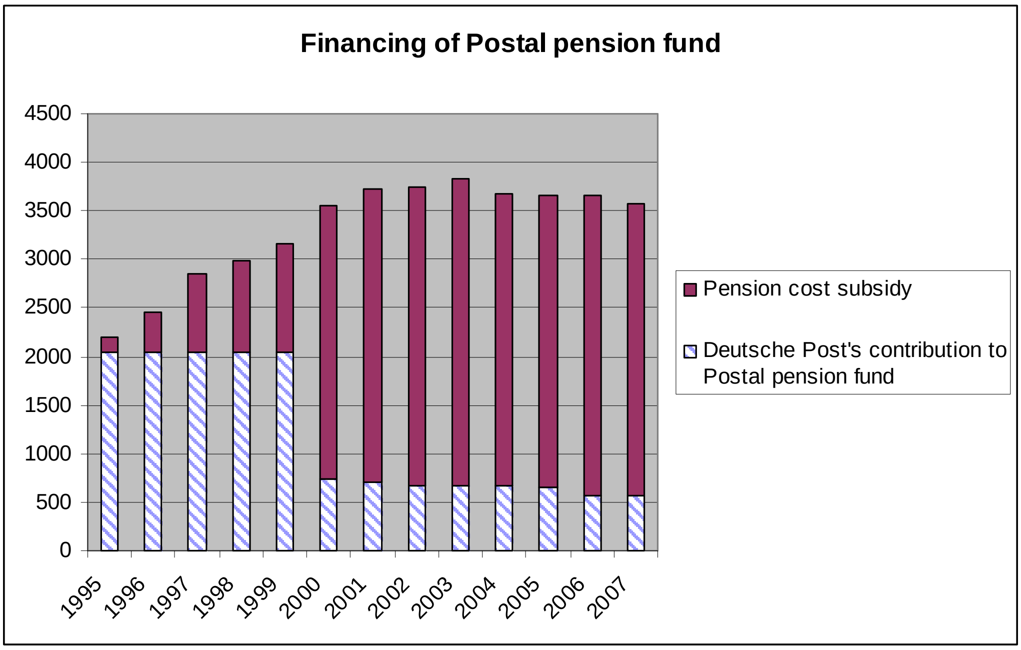
20. According to Article 16(1) PostPersRG 1994, Deutsche Post had to pay a yearly contribution of € 2,045 million to Postal pension fund for the period from 1995 to 1999 which sums up to € 10,225 million. From 2000 onwards and based on Article 16(2) PostPersRG 1994, Deutsche Post had to pay a yearly contribution of 33% of the sum of the active civil servants’ take home pay to the Postal pension fund. That totals up to € 4,600 million for the period from 2000 to 2007.

21. The pension subsidy covered, according to Article 16(2) PostPersRG 1994 the remaining deficit (e.g. the difference between the expenses for the civil servants'

[12] Gesetz über die Versorgung der Beamten und Richter des Bundes of 24. August 1976 (BGBl. I S. 322).

pensions and the contribution by Deutsche Post to the pension fund) of € 27,628 million for the period from 1995 to 2007.

Figure 1 Financing of Postal pension funds (€ million, nominal values)



II.1.4. Statutory social insurance for private employees and supplementary insurance for Deutsche Post's private employees

22. Generally, private employees benefit of four statutory social insurances in Germany: pension, unemployment, health and long-term care insurance.[13] Compared to the civil servant's regime, the statutory social insurance schemes offer a different coverage for the pension and health insurances:

- The predefined pension is not calculated in percentage of the last monthly salary but of an average life-time salary.
- The expenses for health and nursing care are fully covered.

23. There exist also important differences in the pension financing compared to civil servants: The social statutory insurances are pre-financed by joint contributions from the employee and the employer during the employee's working life. The total social contribution rate is formally divided into an employee' and employer's share which both cover about half of the total contribution rate. However, the employer has the obligation to pay the total contribution rate to the social insurances.

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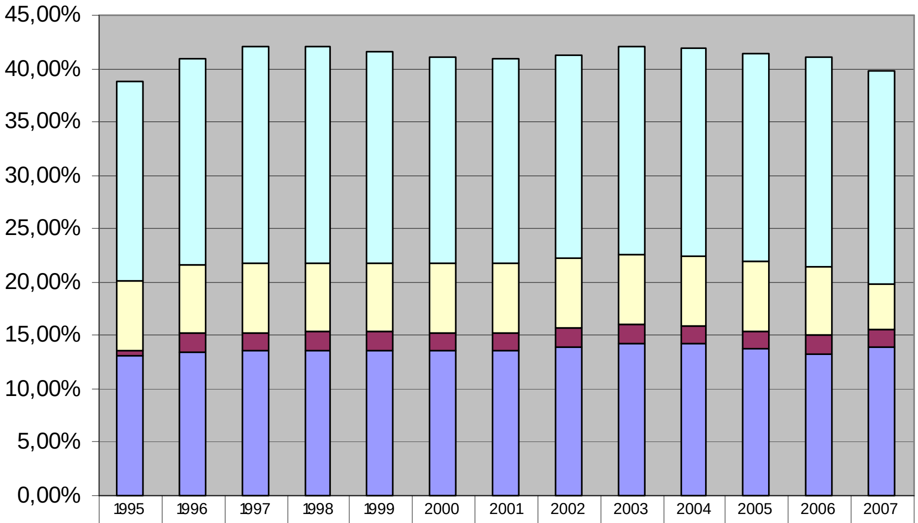
[13] The Sixth Social Code (SGB VI) regulates the pension insurance; The Third Social Code (SGB III) regulates the unemployment insurance; The Fifth Social Code (SGB V) regulates health insurance; Long Term Care Act (PflegeVG) und Eleventh Social Code (SGB XI) regulate the long term care insurance.

Figure 2 Total social contribution rates for private employees (see also the Annex)



	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Pension insurance	18,60%	19,20%	20,30%	20,30%	19,70%	19,30%	19,10%	19,10%	19,50%	19,50%	19,50%	19,50%	19,90%
Unemployment insurance	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	4,20%
Nursing insurance	0,50%	1,70%	1,70%	1,70%	1,70%	1,70%	1,70%	1,70%	1,70%	1,70%	1,70%	1,70%	1,70%
Health insurance	13,15%	13,48%	13,58%	13,62%	13,60%	13,54%	13,58%	13,98%	14,31%	14,22%	13,73%	13,31%	13,90%

24. Figure 2 shows the total contribution rates in percentage of the employee's gross salary for the period from 1995 to 2007. While the **total social contribution rates** fluctuated between **38 to 42 percent** of the gross salary, the **employer's and employees shares** of the social contribution rates were in the range of **19 to 21 percent** (see the Annex for the exact numbers on the individual contributions to the pension, unemployment, nursing, and health insurances as well as the employer's and employee's share of those contributions).

25. It is important to note that the social contribution rates are usually expressed as a percentage of the gross salary which is defined as the sum of the net wage plus the employee's share of the social contributions.

26. Deutsche Post's private employees have not only benefitted from the statutory social insurances but also from supplementary pension insurance. In addition to the statutory social insurances, private employees who started before 1997 were offered a supplementary pension insurance cover which would allow them to receive a similar level of pension as civil servants. This means the supplementary pension insurance covered the difference between the private employees' statutory social insurance pension – which is equal to a certain percentage of the average life-time salary – and the civil servant's pension that equals to a certain percentage of the last salary. The detailed rules are laid down in the Charta of the Versorgungsanstalt der Deutschen Bundespost (hereinafter VAP).[14]

27. The payment of the supplementary pension to the retired private employees was financed up to 1997 by a contribution of about [5% to 10%]* of the active private employees' gross wage that Deutsche Post paid to the VAP. Since 1997, Deutsche

[14] Satzung der Versorgungsanstalt der Deutschen Bundespost (1969 i.d.F.).

Post built up a provision for the outstanding obligations to the VAP (see also burden # 4 in Table 1).

28. Since 1997, newly hired private employees were offered a significantly reduced supplementary pension insurance for which Deutsche Post paid a contribution between [0% and 5%] of the gross wage in the period from 1997 to 2007.

II.2. Detailed description of the exclusive right and price regulation

II.2.1. Legal bases for exclusive right and price regulation

29. Before 1998, Article 2 PostG 1989 granted Deutsche Post the exclusive right to establish and maintain facilities for the carriage of letter items. The other postal services – like parcels, newspapers or periodicals – were not reserved to Deutsche Post but open to competition. In accordance with Article 37 PostVerfG 1989, the profits accruing from these reserved letter services should be used to finance the losses of those universal services which were offered in markets open to competition.[15] According to Article 4 PTRegG 1994,[16] the Minister for Post and Telecommunication was the competent authority to approve the prices for the reserved letter services.

30. Beginning with the enactment of the PostG 1997, the scope of the reserved services started to be progressively reduced for Deutsche Post. According to Article 51 PostG 1997, the exclusive license extended to the transport of letters and addressed catalogues below 200 grams in 1997 but afterwards the limit was successively reduced down to reach 50 grams in 2006. The exclusive license finally expired on 31 December 2007.

31. The PostG 1997 also established the Postal regulator for the supervision of the reserved and liberalized letter markets. According to Article 19 PostG 1997, the Postal regulator has to approve Deutsche Post's pricing in the letter markets in which Deutsche Post enjoys a dominant position. As Deutsche Post had a dominant position not only with the reserved services – according to Article 51 PostG 1997 – but also with almost all other letter services which had already been opened up to competition, the regulated letter services encompass almost all letter services which were provided by Deutsche Post.

II.2.2. Economic data on revenues of regulated and non-regulated services

32. The **regulated letter services** accounted for 62 percent of Deutsche Post's total revenue in the period from 1990 to 2007.

33. The **non-regulated services** accounted for 38 percent of Deutsche Post's total revenue and encompass the following types of services:

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[15] Appendix 3 of the submission by Germany of 16 September 1999.

[16] Gesetz über die Regulierung der Telekommunikation und des Postwesens of 14 September 1994 (BGBl. I S. 1509).

* Business secret

- The **non-regulated universal parcel services** have always been provided on markets open to competition, in which Deutsche Post has only acquired an average market share of 30 percent. During the period from 1990 to 2007, the universal parcel services raised **15 percent** of Deutsche Post's total revenue.

- The **non-regulated universal letter services** (e.g. catalogues, cross-border mail) achieved about **11 percent** of Deutsche Post's total revenue.

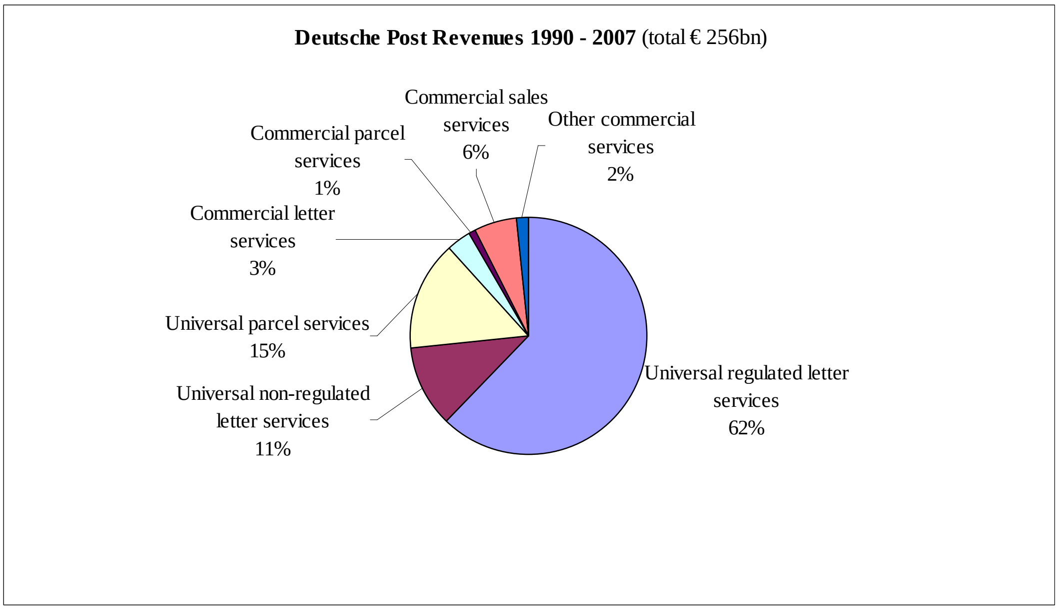
- The **non-regulated commercial services** raised **12 percent** of Deutsche Post's revenues from 1990 to 2007 and can be further classified as follows:

  Ø Deutsche Post has used its post shop network not only for the distribution of postal services but also to sell products and services for Postbank AG and – to a lesser degree – for Deutsche Telekom. These **commercial sales services** achieved about **6 percent** of Deutsche Post's total revenues.

  Ø The **commercial** (non-universal) **parcel** and **letter services** (e.g. addressed publications) account for about **4 percent** of Deutsche Post's total revenues.

  Ø Finally, Deutsche Post provided a number of miscellaneous services, e.g. in its function as holding for international subsidiaries active in other businesses (e.g. DANZAS, DHL). These other commercial services achieved about 2 percent of Deutsche Post's total revenues.

Figure 3 Average revenue shares for the period from 1990 to 2007 (based on nominal values)



II.2.3. Price-setting by Postal regulator

34. For the regulated letter services, Article 20(1) PostG 1997 establishes that the prices shall reflect the costs of the efficient service provision. However, if factually justified, the Postal regulator has *inter alia* to appropriately account for:

- Costs arising from the universal provision of postal services, and

- Costs arising from the financing of pension and health care benefits for employees which were taken over from POSTDIENST.

35. The Postal regulator took its first decision on the price cap for regulated letter prices in 2002 for the period starting on 1 January 2003 (hereafter 2002 price cap decision). At this occasion, Deutsche Post submitted for the first time accounts to the Postal regulator (hereafter 2002 regulatory accounts) that covered the period from 1998 to 2006. The regulatory accounts were based on realized results up to 2001 and on projections for the following years.

36. Deutsche Post claimed in 2002 so-called "burdens" for the provision of universal service as well as for the employment of civil servants and private employees who had been taken over from POSTDIENST. These burdens show the alleged costs that Deutsche Post would not have assumed without the universal service obligation and without the take-over of the POSTDIENST personnel and infrastructure (see Table 1 and Annex 1 for a detailed list).

37. It is important to note that Deutsche Post did not only include costs in these burdens that were incurred for the provision of the regulated letter services but also costs that were incurred for the provision of non-regulated universal services (e.g. burden # 5 on additional costs for the maintenance of the universal parcel network) and costs that were incurred for both non-regulated universal as well as commercial services (e.g. burdens # 1 and 2 on "excessive" wage costs and social contributions due to the take-over of civil servants and private employees from POSTDIENST). The regulated letter services therefore finance costs that were incurred for non-regulated universal and commercial services.

38. The Postal regulator eventually accepted Deutsche Post's reasoning that it would not have incurred those burdens without the universal service obligation (e.g. burdens # 3 and 5 on universal service costs) respectively the obligation to take over the civil servants and private employees from POSTDIENST (e.g. burdens # 1, 2, 4, 6, 7, and 8) and approved increased regulated letter prices to finance the claimed average annual burdens of […] million for the period from 1998 to 2006 out of the revenues of the regulated letter services.

Table 1 Universal service burdens as claimed by Deutsche Post with 2009 regulatory accounts (€ million, nominal values)

		2002 Price cap decision		
#	Burden	m EUR (1998-2006)	%	Average
1	"Excessive" wage costs	[...]	[...]	[...]
2	"Excessive" social contributions	[...]	[...]	[...]
3	Universal service burden post offices	[...]	[...]	[...]
4	Supplementary pension insurance for private employees	[...]	[...]	[...]
5	Universal service burden parcel network	[...]	[...]	[...]
6	"Excessive" social benefits	[...]	[...]	[...]
7	Personnel restructuring	[...]	[...]	[...]
8	Deficit coverage for health insurance funds	[...]	[...]	[...]
	Total burdens	[...]	100.0%	[...]

39. For the period before 1998, detailed regulatory accounts do not exist to show how the competent regulatory authority calculated the regulated prices at that time. The Minister of Economics and Technology decided on 27 March 2000 that the prices

which were approved on 1 September 1997 would remain in force until 31 December 2002.[17]

II.2.4. Financing of pension costs through increased regulated letter prices

40. Concerning the pension financing, it is important to understand the calculation of the burden # 2 on the excessive social contributions.

41. As explained in section II.1.3, Deutsche Post paid from 1995 to 1999 a lump-sum of € 2,045 million and afterwards 33 percent of the take-home pay of the active civil servants to the Postal pension fund to contribute to the financing of the pension and health expenses of the retired civil servants. Furthermore, Deutsche Post paid a share of the active civil servants' health expenses and the contribution to the accident insurance.

42. With the Postal regulator, Deutsche Post has consistently claimed that the social costs for civil servants would be in excess of the social contribution rate that private competitors have normally to pay for their employees. As shown in Table 2 and in the Annex, Deutsche Post defines the so-called "competitive" social contribution rate as the sum of

    - Employer's share of social contributions for a private employee (about 19 to 21 percent of gross wage; which equals roughly half of the total social contribution rate as shown in Figure 2),

    - Contribution to the accident insurance ([0% to 5%] of gross wage since 2001),

    - Contribution to supplementary pension ([0% to 5%] of gross wage since 1997; based on the contributions to the supplementary pension insurance VAP for Deutsche Post's private employees, as described in section II.1.4).

43. The social costs which go beyond this claimed "competitive" rate are defined as "excessive" social costs (respectively burden # 2). The following Table 2 shows e.g. the calculation for the year 2001.

[17] 2002 Price cap decision, p. 7.

Table 2 Calculation of "excessive" social contribution costs for civil servants in 2001 according to regulatory accounts (€ million)

	Deutsche Post's benchmark			
(1)	Civil servants' wage sum			[…]
(2)	"Competitive" contribution rate	*(3)+(4)+(5)*		[20% to 25%]
(3)	Empployer's share of social contributions		20.43%	
(4)	Accident insurance		[…]	
(5)	Supplementary pension		[…]	
(6)	"Competitive" social cost	*(1)*(2)*		[…]
	Incurred social costs			
(7)	Contribution rate for postal pension fund		33%	
(8)	Contribution to postal pension fund	*(1)*(7)*	[…]	
(9)	Health expenses (incl. Accident insurance)		[…]	
(10)	Sum	*(8)+(9)*		[…]
(11)	**"Excessive" social costs**	*(10)-(6)*		[…]

44. The financing of the allegedly "excessive" social costs through increased regulated letter prices leads to a cross-subsidisation of the social costs for the non-regulated universal and commercial services with revenues earned in the regulated area where Deutsche Post held an exclusive licence or dominant position:

- For a civil servant who worked e.g. in 2001 for the provision of a non-regulated service, Deutsche Post paid 33 percent of the civil servant's take-home pay to the Postal pension fund as well as the further health expenses.

- However, the non-regulated services had only to finance the so-called "competitive" contribution rate of [20 to 25] percent (see line (2) in Table 2) out of their own revenues. As explained above, Deutsche Post's so-called "competitive" contribution rate is the sum of the employer's share of the social contribution rate, the contribution to the accident insurance as well as the contribution to the supplementary pension insurances (see lines (3) to (5) in Table 2).

- Consequently, the excess of the incurred social costs (see line (10) in Table 2) over the so-called "competitive" social costs (see line (6) in Table 2) was accepted by the regulator to be financed through increased regulated letter prices. For 2001, a burden of "excessive" social costs resulted in the order of € […] million.

- In particular, the Postal regulator accepted that the non-regulated services did not have to fully finance the 33-percent contribution to the Postal pension fund out of their own revenues but only the so-called "competitive" contribution rate of [20 to 25] percent. The excess contribution of [8 to 13] percent (= 33 – [20 to 25] percent) as well as the incurred health expenses (see line (9) in Table 2) were financed through increased regulated letter prices.

45. The Postal regulator approved the claimed burden of "excessive" social costs for the period from 1998 onwards. Furthermore, Deutsche Post has also applied the same calculation method since 1995 in its management accounts.

III. COMMENTS BY GERMANY ON PENSION SUBSIDY

III.1. Existence of aid

46. In the Combus judgement[18], the GC ruled on the aid qualification of public compensation for the costly status of civil servants who were seconded to the recently privatized bus company Combus:

> "[…] *the measure in question had been introduced to replace the privileged and costly status of the officials employed by Combus with the status of employees on a contract basis comparable to that of employees of other bus transport undertakings competing with Combus. The intention was thus to free Combus from a structural disadvantage it had in relation to its private-sector competitors. Article 87(1) EC is aimed merely at prohibiting advantages for certain undertakings and the concept of aid covers only measures which lighten the burdens normally assumed in an undertaking's budget and which are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions."*

47. Following the Combus judgement, Germany is of the opinion that, in the course of the privatization of formerly state-owned universal service providers, the public compensation of pension costs – which go beyond the level normally assumed by private competitors – would not constitute aid in the meaning of Article 107(1) TFEU.

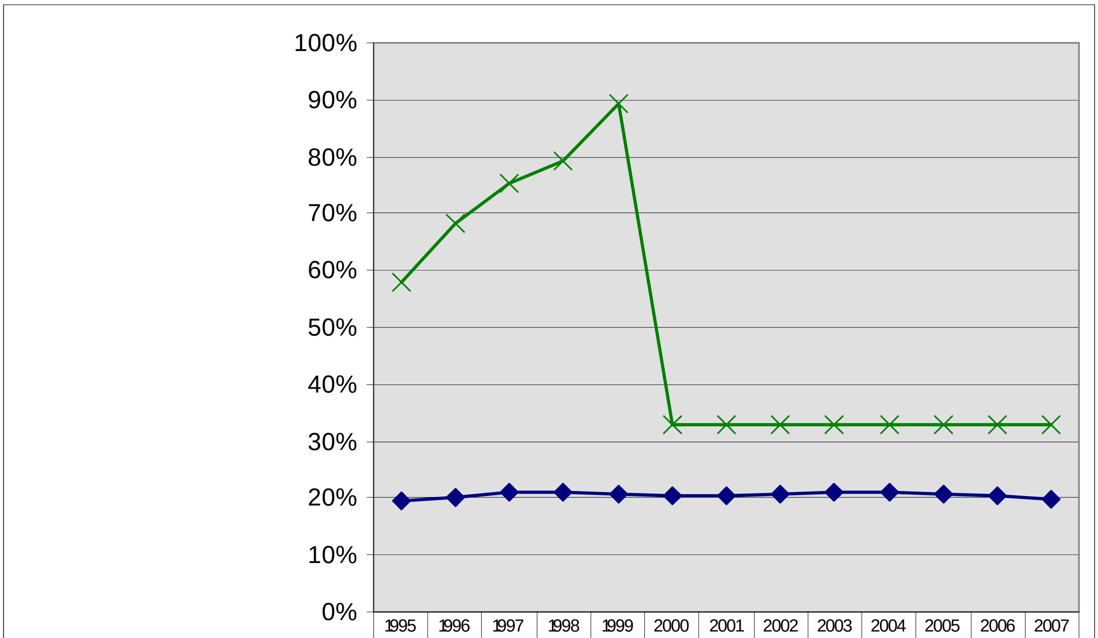
48. Germany asserts that Deutsche Post constantly paid more than the social costs normally assumed by private competitors. Thereby, Germany uses the employer's share of the contribution rate to the statutory social insurances (including pension, health, nursing, and unemployment insurances) as benchmark. The employer's share of the social contribution rate fluctuated between 19 and 21 percent of gross wage in the period from 1995 to 2007, as shown in Figure 4 (see also the definition of the so called "competitive" social contribution rate in section II.2.4 and in the Annex).

49. Expressing Deutsche Post's contributions to the Postal pension fund (e.g. annual lump-sum payments of € 2,045 m from 1995 to 1999 and 33 percent of the active civil servants' take-home pay from 2000 onwards) as percentage of the take-home pay of the active civil servants, it shows that Deutsche Post constantly paid a contribution rate to the Postal pension fund that was above the employer's share of the social contribution rate. The Figure 4 shows the comparison between the two contribution rates over the whole period from 1995 to 2007.

50. Germany concludes therefore that the pension subsidy could not be regarded as State aid in the meaning of Art 107(1) TFEU because it only compensated extra costs due to the take-over of the civil servants from POSTDIENST and did not provide any financial advantage to Deutsche Post.

[18] Case T-157/01 *Danske Busvognmænd v Commission* [2004] ECR II-917, para 57.

Figure 4 Comparison between employer's share of social contributions for a private employee and DPAG's contributions to Postal pension funds (percentage of civil servants' wage sum)



	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Employer's share of social contributions	19,63%	20,27%	21,04%	21,06%	20,65%	20,54%	20,44%	20,64%	21,01%	20,96%	20,72%	20,51%	19,85%
Deutsche Post's contribution to Postal pension funds	58,06%	68,35%	75,41%	79,24%	89,38%	33,00%	33,00%	33,00%	33,00%	33,00%	33,00%	33,00%	33,00%

III.2. Existing aid

51. According to Regulation Article 1 (b) (i) and (v) of Regulation 659/1999, existing aid encompasses – inter alia – aid measures that were put into effect before the entry of the Treaty or that at the time of their granting did not constitute aid but subsequently could be characterised as such due to the evolution of the common market without alterations by the Member State concerned.

52. Germany is of the opinion that if the pension subsidy was to be considered as State aid it would have to be qualified as existing aid according to Art. 1 (b) (i) of Regulation 659/1999 because, since 1953, the State has been liable to finance the civil servants' pensions. Germany emphasises, that under constitutional law[19] those salary and pension claims would neither have been affected by the first postal reform in 1989 nor by the second postal reform in 1995. The establishment of the Postal pension fund was solely due to administrative reasons and thus cannot be regarded as a substantial change.

53. The pension subsidy would also constitute existing aid according to Art. 1 (b) (v) of Regulation 659/1999 if it was considered that it became an aid due to the evolution of the common market because Germany never enacted any alterations.

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[19] Article 143 b para 3 and Article 33 para 5 Grundgesetz.

III.3. Compatible aid as compensation for 'legacy' costs pursuant to Article 107(3)(c) TFEU

54. If the pension subsidy constituted aid Germany would consider it as compatible aid under Article 107(3)(c) TFEU following the reasoning taken by the Commission in its decision on the public financing of pension costs for civil servants working for La Poste (hereafter La-Poste decision)[20]. The pension subsidies to La-Poste were considered compatible because La Poste was subject to pay the same social contribution rate as competitors. As Deutsche Post always paid more to the Postal pension fund than the employer's share of the statutory social contribution rate for private employees, the pension subsidies would just as well have to be considered as compatible aid for the compensation of 'legacy' costs under Article 107(3)(c) TFEU.

55. Based on the submitted expert study, Germany argues that the compatibility of the pension subsidy could not be assessed as universal service compensation because Germany did not evoke Article 106(2) TFEU as justification for the compatibility of the pension subsidy and such an assessment would also be contradictory to the Commission practice (see *inter alia* the La-Poste decision). Furthermore, the Commission would in any case be obliged to examine *ex officio* the pension subsidy primarily under Article 107(3) TFEU. The exemption under Article 106(2) TFEU could only be applied for an aid measure that was not already compatible under the general exemption pursuant to Article 107(2)(3) TFEU.

56. Finally, Germany emphasizes that a calculation of the overcompensation would not be necessary for the compatibility assessment of the pension subsidy pursuant to Article 107(3) TFEU because such an assessment would only be based on a comparison with the social contribution rates paid by competitors.

IV. ASSESSMENT OF AID

IV.1. Existence of aid under Article 107(1) TFEU – Financial advantage granted by pension subsidy

57. Article 107(1) TFEU provides that ‘any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market’. In determining whether a measure constitutes State aid within the meaning of Article 107(1) TFEU, the Commission has to apply the following criteria: the measure must be imputed to the State and use State resources, it must confer an advantage on certain undertakings or certain sectors which distorts competition and it must affect trade between Member States.

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[20] Commission Decision of 10 October 2007 on the State aid implemented by France in connection with the reform of the arrangements for financing the retirement pensions of civil servants working for La Poste (OJ L 63, 7.3.2008, p. 16).

58. The 2002 Decision[21] had already established that the pension subsidies are State resources within the meaning of Article 107(1) TFEU to which Germany did not object. The pension subsidy was set up by Article 16 PostPersG 1994 and clearly constituted a burden for the public budget. Furthermore, as Deutsche Post has been active on the European markets for parcel or express letter services which are characterized by intense competition with other providers – like UPS, TNT, La Poste, Royal Mail, there is no doubt that any public measure in favour of Deutsche Post affects competition and trade between Member States.

59. Following the Combus judgement, Germany claims that the pension subsidy would not provide any financial advantage because it relieved Deutsche Post of abnormal pension costs that go beyond the level normally assumed by private competitors.

60. In order to ascertain whether the pension subsidies have provided a selective financial advantage, it needs to be determined whether they have allowed Deutsche Post to avoid costs that would normally have had to be borne by its own financial resources and have thus prevented market forces from producing their normal effect.[22]

61. It must be recalled that aid consists in the mitigation of charges normally included in the budget of an undertaking, taking account of the nature or general scheme of the system of charges in question. Conversely, it could be possible to define a concept of ‘special charge’ which would consist in an additional charge over and above those normal charges[23]. The withdrawal of such a special charge by way of a legislative provision would not grant any advantage to the beneficiary and would not, therefore, constitute State aid.

62. Like the Court's case law regarding selectivity analysis[24], which involves a comparison with a reference framework in order to determine whether differential treatment of certain undertakings and products is in conformity with the ‘nature or general scheme of the system’, the decision to be taken in what is, from a structural viewpoint, a normal market situation as to whether a charge is ‘normal’ or ‘special’ has to be based on a reference framework or comparator with a view to identifying undertakings which would be in a legal and factual situation that is comparable in the light of the objective pursued by the measures in question.

63. In theory, there exist basically two reference frameworks: (i) exogenous comparators (e.g. the situation of Deutsche Post's competitors) and (ii) comparison to Deutsche Post's situation before the 1995 pension reform. If no appropriate exogenous comparators were available, the reference framework for the existence of the

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[21] 2002 Decision, margin numbers 92 to 95.

[22] Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 41.

[23] Case 390/98 *H.J. Banks & Co. Ltd v The Coal Authority and Secretary of State for Trade and Industry* [2001] ECR I-6117.

[24] Case C-143/99 *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, margin number 41.

advantage would then be the situation of Deutsche Post itself prior to the granting of the measures.

IV.1.1. Comparison to competitors' pension costs

64. As already discussed in the La-Poste Decision, it would be very difficult for the Commission to identify operators who would be in a legal and factual situation comparable to that of postal incumbents, notably as regards the pension financing. Likewise, it does not seem possible to transpose the Combus reasoning to postal incumbents because significant legal and factual differences exist between postal incumbents and their competitors.

65. For the case of Deutsche Post it must, amongst other, be taken into account that

- Deutsche Post was granted the exclusive right for the provision of universal letter services. The exclusive right was granted to Deutsche Post with a view, according to Article 20(2) PostG 1997, to cover burdens concerning the universal service obligation and the take-over of POSTDIENST personnel.

- DPAG inherited the liabilities but also all the assets of the previously existing DB-POSTDIENST.

- Deutsche Post was furthermore granted public transfers to cover losses up to 1995 and enjoyed up to 2002 public guarantees for debts that had been borrowed before 1995 when Deutsche Post had been a public-law entity. Other competitors did not benefit from these advantages.

66. Since Deutsche Post's position is unique, its competitors cannot be used as a comparator in the analysis which the Commission has to carry out in order to determine whether or not an advantage within the meaning of Article 107(1) TFEU existed.

67. That said, the Commission would point out that such a comparator will clearly be appropriate for examining the compatibility of any aid measures under review in the light of Article 107(3)(c) TFEU when the distortion of competition on the relevant markets is assessed in greater detail.

IV.1.2. Comparison to pre-1995 pension financing at Deutsche Post

68. In absence of any exogenous comparators, the Commission must refer to the situation of Deutsche Post prior to the 1995 pension reform as a benchmark to determine whether or not the pension subsidy has relieved Deutsche Post of normal business costs. In an analysis of the normal or abnormal nature of pension costs, the Commission takes the view that the liabilities a company itself bears under employment legislation or collective agreements with trade unions are part of the normal costs of a business which a firm has to meet from its own resources.[25]

[25] La-Poste decision, margin numbers 141 to 141, and Community guidelines on State aid for rescuing and restructuring firms in difficulty, margin number 63.

69. As explained in section II.1, Deutsche Post fully financed the civil servants' pension costs out of its own revenues before 1995. Furthermore, it must be noted that it is common practice in Germany that private companies fully finance the pension costs – whether they originate from mandatory social insurance schemes or supplementary private insurance schemes – from their own revenues.

70. Compared to the pre-1995 pension financing regime, Deutsche Post was therefore relieved by the 1995 pension reform from the obligation to fully fund the pension costs for the civil servants out of its own revenue.

71. At this stage, it seems therefore that the pension subsidy provided a financial advantage because it relieved Deutsche Post of normal business cost that had been financed out of own revenues before the pension reform in 1995.

IV.1.3. Further discussion concerning Combus judgement

72. The Commission cannot accept Germany's claim based on the Combus case law. In the Combus judgement, the Court of First Instance seems to regard as ‘abnormal’ charges resulting from the exceptional status of the personnel of an undertaking which, in the wake of a reform, finds itself in a situation governed by ordinary law and thus identical to that of its competitors as regards personnel management.

73. In general, it must first be recalled that the Combus ruling has not been confirmed by the Court of Justice. Certain points in its case law contradict the assumption that compensation for a structural disadvantage would rule out any classification as aid. For instance, it has consistently ruled that the existence of aid was to be assessed in relation to the effects and not the causes or objectives of state intervention[26]. It has also maintained that the concept of aid covers advantages granted by the public authorities that, in various forms, mitigate the charges normally included in the budget of an undertaking[27]. It has also clearly indicated that the costs linked to employee pay naturally place a burden on the budgets of undertakings, irrespective of whether or not those costs stem from legal obligations or collective agreements[28]. In this connection, it has ruled that state measures aimed at compensating for additional costs cannot exclude them from being categorised as aid.[29]

74. The Commission must point out that material factors distinguish the Combus case from the present case, including the following:

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[26] Case 173/73, *Italy v Commission* [1974] ECR 709, paragraph 13; Case C-310/85 *Deufil v Commission* [1987] ECR 901, paragraph 8; Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 20.

[27] Case C-387/92 *Banco Exterior* [1994] ECR I-877, paragraph 13; Case C-241/94, referred to above, paragraph 34

[28] Case C-5/01 *Belgique v Commission* [2002] ECR I-1191, point 39.

[29] Case 30/59 *Gezamenlijke Steenkolenmijnen in Limburg v Haute Autorité* [1961] ECR 3, points 29 and 30; Case C-173/73, referred to above, points 12 and 13; Case C-241/94, referred to above, points 29 and 35; Case C-251/97 *France v Commission* [1999] ECR I-6639, points 40, 46 and 47.

- The compensation is paid direct to the civil servants employed by Combus whereas the measures under scrutiny in this decision concern the pension subsidies that cover the deficit of the Postal pension funds.

- The Commission doubts that, in practice, Germany would be able to re-integrate the all civil servants working for Deutsche Post into the administration.

- The relevant state measure in the Combus case was designed to replace the privileged and costly status of civil servants working for Combus by contract agent status comparable to that of employees of other bus transport companies competing with Combus. By contrast, the status and rights of civil servants working for Deutsche Post remain unchanged as a result of the measures under review. That status and those rights are different from those of the employees under private law working for companies competing with Deutsche Post.

- The competitive background in which Combus was operating differed from that for Deutsche Post. Combus had to conduct its transport business on a commercial basis and operate on a market under conditions of competition comparable to those for private bus companies. After a tendering procedure, public transport companies divest their bus transport operations to private and public undertakings. Under the tendering rules, the contracts are awarded to the 'economically most advantageous bid', irrespective of the private or public nature of the tenderer. DPAG had a wide-ranging monopoly where economic constraints operate differently.

IV.2. Existing aid in the meaning of Article 108(3) TFEU

75. Germany claims that the pension subsidy from 1995 onwards constitutes – if at all – existing aid according to Art.1 (b)(i) of Regulation 659/1999 because the German State has been liable under constitutional law to finance the civil servants' pensions since 1953 and the set-up of the Postal pension fund would not have substantially changed this obligation.

76. It is important to point out, that the definition of new aid also covers, in accordance with Article 1 (c) of the Procedural Regulation, the amendment of an existing aid. According to Article 4, paragraph 1 of Commission Regulation (EC) No 797/2004, modification of an existing aid measure means any changes other than modifications of a purely formal or administrative nature which are not likely to influence the assessment of the compatibility of the aid measure with the common market.

77. It is far from clear that the detachment of DB-POSTDIENST from the federal administration in 1989 would be such a change of purely formal or administrative nature. More important doubts still surround the qualification of the set-up of DPAG and the Postal pension fund in 1995 which led to a complete overhaul of the pension funding for civil servants. One should also take into account that these two transformations were related to major legislative changes.

78. In particular, the financing regime of the civil servants' pensions was fundamentally changed in 1995. While, before 1995, Deutsche Post was obliged to finance the pension costs for the retired civil servants out of its own revenues and did not receive any pension subsidy, Deutsche Post contributed, after 1995, only a

decreasing share of these pension costs out of its own revenues and the remaining deficit of the Postal pension fund was covered by the pension subsidy (see Figure 1).

79. The Commission considers that the claimed constitutional obligation of Germany to ultimately ensure the financing of civil servants pensions does not mean that any aid scheme that this Member State may enact to discharge its obligation under national law must necessarily be considered as existing aid.

80. Consequently, the pension subsidy constitutes a new aid measure.

81. Furthermore, it must be emphasized that the pension subsidy was already part of the 1999 opening decision and that neither Germany nor Deutsche Post raised the claim that the pension subsidies would constitute existing aid measures prior to their comments to the 2007 opening decision. However, according to case-law, it is the Member State's responsibility to raise the issue of existing aid as soon as possible in the proceedings.[30]

IV.3. Compatibility assessment of pension subsidy pursuant to Article 107(3)(c) TFEU

82. As the derogations provided for in Articles 107(2) TFEU and 107(3)(a)(b) TFEU do clearly not apply and as Germany has neither invoked nor does it want the Commission to avail itself of Article 106(2) TFEU as justification for the compatibility of the pension subsidy granted to Deutsche Post, the Commission will examine whether the pension subsidy can be declared compatible pursuant to Article 107(3)(c) TFEU, which states that aid to facilitate the development of certain economic activities or of certain economic areas may be declared compatible with the common market where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

83. The La Poste Decision set forth the Commission's proportionality assessment of aid measures that provide a relief of pension costs for postal incumbents who continue to employ civil servants at terms which were agreed during the monopoly period. The proportionality assessment must be carried out with regard to the establishment of a level playing field on the markets which are open to competition (e.g. mail, parcels, and financial services). The incumbent shall be subject to the same rate of social security contributions as competitors.

84. Germany maintains that the pension subsidy would be proportional under Article 107(3)(c)TFEU because Deutsche Post has always paid higher social contributions for its civil servants than what competitors have paid for their private employees. However, as the following sections will show, Germany's position must be rejected because Germany applies a benchmark, which is lower than the competitors' total social contribution rates, and ignores that a substantial part of the civil servants' pension costs was refinanced by increased regulated letter prices. As in the La Poste case there were no elements suggesting that the regulated letter prices had been increased to cover some of the excessive pension costs, the Commission did not have to deal with that issue in that case.

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[30] Case C-400/99 Italy v Commission [2005] ECR I-3657, margin number 55.

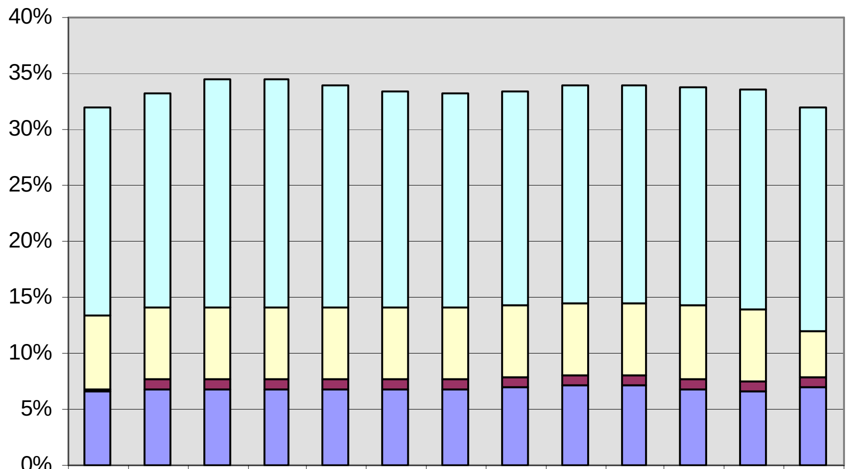
IV.3.1. Benchmark for social contribution rate

85. Deutsche Post should be faced with the same statutory social contribution rate as its competitors who employ private employees. As explained in section II.1.4, private employers are subject to the total rate of social contributions (= sum of employee's and employer's shares) that has to be financed out of the revenues.

86. However, as civil servants cover 30 to 50 percent of their health expenses out of their own pockets (e.g. their take-home pay) while private employees enjoy a full coverage of health expenses by the social health insurance, the benchmark rate for Deutsche Post will have to be adjusted accordingly. The benchmark contribution rate will equal the total contribution rate for pension and unemployment insurance plus the employer's share for health and nursing insurance (assuming a 50 percent contribution by civil servants).

87. The following Figure 5 shows the benchmark contribution rate in percentage of the gross salary of a private employee. Please note that that the gross salary equals the take-home pay plus employee's share of social contribution. For the following analysis, all contribution rates will be specified in percentage of gross salary.

Figure 5 Benchmark for social contribution rate (percentage of gross salary)



	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Pension insurance	18,60%	19,20%	20,30%	20,30%	19,70%	19,30%	19,10%	19,10%	19,50%	19,50%	19,50%	19,50%	19,90%
Unemployment insurance	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	4,20%
Nursing insurance (Employer's share)	0,25%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%
Health insurance (Employer's share)	6,58%	6,74%	6,79%	6,81%	6,80%	6,77%	6,79%	6,99%	7,16%	7,11%	6,87%	6,66%	6,95%

88. It is important to note that only considering the employer's share – as Germany and Deutsche Post propose with the so-called "competitive" contribution rate – is insufficient because it does not matter which share of the social contributions the employer or the employee pays but that the total social costs must be financed out of the employer's revenue. Obliging Deutsche Post to only pay the employer's share would put it at an advantage compared to its competitors who have to finance the total amount of social contributions out of their own revenues.

IV.3.2. Deutsche Post's social contribution rate

89. To undertake a meaningful comparison between the social contribution rates for private employees and Deutsche Post's contribution rates for the civil servants, it must first be ensured that a common salary base, to which the percentage rates refer, is employed. Deutsche Post expresses its so-called "competitive" social contribution rate as a percentage of the civil servant's take-home pay. However, the social contribution rate for private employees is generally expressed in terms of the gross salary which is higher than the take-home pay. To be exact, the gross salary is defined as the sum of take-home pay and employee's share of the social contribution rate (for pension, health, and unemployment insurance).

90. To be able to compare the social contribution rates for civil servants with those of private employees, the civil servant's take-home pay is converted into an "adjusted" gross salary such that both rates refer to the same base. As, compared to private employees, civil servants do not contribute to the pension and unemployment insurance but pay 30 to 50 percent of their health insurance out of their take-home pay, the employee's share for the pension and unemployment insurances are added to the civil servant's take-home pay to obtain the "adjusted" civil servants' gross salary. The civil servant's take-home will accordingly be inflated by the factor 1/(1-(employee's share of pension and unemployment insurance)). This rests on the assumption of a 50 percent contribution to the health insurance by civil servants themselves out of their take-home pay.

91. As explained in detail in the Annex, the contribution rate to the Postal pension fund, which amounts to 33 percent of the civil servants' take home pay, translates into an average nominal contribution rate of 28.75 percent of the adjusted gross salary for the period from 1995 to 2007.

92. By adding the expenses for the civil servants' health expenses to the contribution rate to the Postal pension fund, it would seem that Deutsche Post paid a social contribution rate above the benchmark rate. However, such a comparison ignores that Deutsche Post also benefitted from increased regulated letter prices to finance the civil servants' pension costs.

93. To calculate the contribution rate that Deutsche Post effectively paid, not only the contributions to the Postal pension fund but also the refinancing through increased regulated letter prices according to Article 20(2) PostG 1997 is taken into account. Only by considering both compensation sources – the pension subsidy and the financing from the regulated letter services, the effective financial burden for Deutsche Post can be ascertained.

94. As explained in section II.2.4 and in the Annex, the Postal regulator approved a refinancing of the contribution to the Postal pension funds through higher prices for regulated letter prices. Although Deutsche Post paid 28.75 percent of the adjusted gross wage (respectively 33 percent of the civil servants' take-home pay) to the Postal pension fund, the non-regulated universal and commercial services had to only bear a contribution rate of 20 percent or less, measured in percentage of adjusted gross salary, because all remaining and allegedly "excessive" social costs were financed through increased regulated letter prices as approved by the Postal regulator according to Article 20(2) PostG 1997.

95. To sum up, Germany enacted with Article 20(2) PostG 1997 a public measure specifically intended to finance social costs for civil servants taken over from the former postal administration. This ensured to Deutsche Post an increased revenue stream arising from the regulated letter revenues. The acceptance by the Postal regulator of an excessive social cost to be financed out of the regulated letter revenues led to an increase of the regulated letter prices. As Deutsche Post has enjoyed an exclusive right or a very strong dominant position on the regulated letter markets, Deutsche Post was able to pass on those increased prices to consumers without facing any appreciable economic consequences.

96. Therefore, in order to assess the compatibility of the pension subsidies with the internal market in the light of Article 107(3)(c) TFEU, which implies that the pension subsidy is limited and proportional to what is necessary to compensate Deutsche Post for the excessive pension costs compared to that of its competitors, the Commission has to take into account that Deutsche Post benefitted from two public measures intended to compensate the civil servants' social costs: the pension subsidy (which is a State aid) and the increased regulated letter prices (which is fixed also in order to cover for part of the civil servants' social cost).

97. At this stage, the Commission considers that, thanks to the pension subsidy and the increased regulated letter prices that the Postal regulator approved, Deutsche Post was relieved by 12 to 15 percentage points, in terms of the adjusted gross salary, from social costs compared to the benchmark rate.

Figure 6 Relief of social costs for Deutsche Post's non-regulated services (e.g. universal and commercial services in competition)

[…]

98. As Figure 7 and the more detailed calculations in the Annex show, the relief from social costs equals each year amounts between € 100 million and € 200 million.[31]

Figure 7 Relief of social costs (€ million, nominal values) for Deutsche Post's non-regulated services (e.g. universal and commercial services in competition)

[…]

99. Considering the combined relief by the pension subsidies and the increased regulated letter prices over the whole period from 1995 to 2007, Deutsche Post had to effectively carry social costs for the civil servants that were by € [2 to 3] billion (in actualized 2007 value) below the competitors' social contribution costs.

100. This means that in the absence of the increased regulated letter prices specifically intended to finance the civil servant's social costs, Deutsche Post would have had to

[31] As the more detailed calculations in the Annex show, the civil servants' adjusted gross wage sum in the non-regulated services was approximated by taking the revenue shares of regulated and non-regulated services because the precise number of civil servants who worked for the non-regulated services was not retrievable from Deutsche Post's accounting. The revenue shares should provide consistent first approximation for the whole period. However, a more accurate calculation of the adjusted gross wage sum could be possible.

pay an additional contribution to the Postal pension fund of € [2 to 3] billion for the period from 1995 to 2007.

IV.3.3. Conclusions on compatibility assessment

101. Not only the German authorities took over a major share of the retired civil servants' pension costs (e.g. 80 percent after 2000) but the Postal regulator also approved increased letter prices to finance the civil servants' pension costs such that the non-regulated universal and commercial services could benefit from a social contribution rate below their competitors' level.

102. As both measures were granted for the same objective, that is to relieve Deutsche Post of excessive pension costs, the proportionality of the pension subsidy should be assessed in light of the cost relief that the Postal regulator had already approved. Only by taking into account the additional financing from the regulated letter services, it seems possible to determine whether Deutsche Post's non-regulated services had effectively to bear the same social contribution rate as competitors.

103. Taking account of the dedicated increase in regulated letter prices, it appears that Deutsche Post's contributions to the Postal pension funds should have been higher by € [2 to 3] billion for the period from 1995 to 2007 to ensure a level playing field between Deutsche Post and its competitors who could not resort to a regulated monopoly for financing their social costs.

V. CONCLUSIONS

104. The Commission invites Germany and interested parties to submit comments on the preliminary compatibility assessments concerning the pension subsidies as compensation for 'legacy' costs pursuant to Article 107(3)(c) TFEU.

VI. DECISION

105. In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108 (2) TFEU, requests Germany to submit its comments and to provide all such information as may help to assess the aid, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

106. The Commission wishes to remind Germany that Article 108 (3) TFEU has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

107. The Commission wishes to remind Germany that it will inform interested parties by publishing this letter and a meaningful summary of it in the Official Journal of the European Union. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the Official Journal of the European Union and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

108. If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by this deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
Directorate F
State Aid Greffe
J-70 3/232
B-1049 Brussels

Fax No: +32 2 296 12 42

Yours faithfully,

For the Commission

Joaquin ALMUNIA

Vice-President of the Commission

ANNEX

Table i Financing for civil servants' pensions (in Million Euros)

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Pension payments by DB Postdienst	1216	1325	1490	1525	1647													
Pension payments by postal pension fund						2197	2462	2846	2986	3163	3553	3720	3749	3823	3683	3657	3650	3574
Payments by Deutsche Post AG into postal pension fund						2045	2045	2045	2045	2045	735	697	678	669	665	647	559	561
Public subsidy to postal pension fund						151	417	801	941	1118	2819	3023	3071	3154	3018	3010	3092	3013

Table ii Calculation of benchmark and effective social contribution rate under Article 107(3)(c) TFEU (in Million Euros)

			1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
(1)	**Total social contribution rate**		38,98%	40,02%	42,14%	42,14%	41,54%	41,18%	40,86%	41,30%	42,20%	42,00%	41,54%	41,00%	39,70%
(2)	Health insurance		12,88%	12,96%	13,64%	13,64%	13,64%	13,68%	13,56%	14,00%	14,50%	14,30%	13,84%	13,30%	13,90%
(3)	Nursing insurance		1,00%	1,36%	1,70%	1,70%	1,70%	1,70%	1,70%	1,70%	1,70%	1,70%	1,70%	1,70%	1,70%
(4)	Unemployment insurance		6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	4,20%
(5)	Pension insurance		18,60%	19,20%	20,30%	20,30%	19,70%	19,30%	19,10%	19,10%	19,50%	19,50%	19,50%	19,50%	19,90%
(6)	**Employer's share**		19,49%	20,01%	21,07%	21,07%	20,77%	20,59%	20,43%	20,65%	21,10%	21,00%	20,77%	20,50%	19,85%
(7)	Health insurance		6,44%	6,48%	6,82%	6,82%	6,82%	6,84%	6,78%	7,00%	7,25%	7,15%	6,92%	6,65%	6,95%
(8)	Nursing insurance		0,50%	0,68%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%
(9)	Unemployment insurance		3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	2,10%
(10)	Pension insurance		9,30%	9,60%	10,15%	10,15%	9,85%	9,65%	9,55%	9,55%	9,75%	9,75%	9,75%	9,75%	9,95%
(11)	**Employee's share**		19,49%	20,01%	21,07%	21,07%	20,77%	20,59%	20,43%	20,65%	21,10%	21,00%	20,77%	20,50%	19,85%
(12)	Health insurance		6,44%	6,48%	6,82%	6,82%	6,82%	6,84%	6,78%	7,00%	7,25%	7,15%	6,92%	6,65%	6,95%
(13)	Nursing insurance		0,50%	0,68%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%
(14)	Unemployment insurance		3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	2,10%
(15)	Pension insurance		9,30%	9,60%	10,15%	10,15%	9,85%	9,65%	9,55%	9,55%	9,75%	9,75%	9,75%	9,75%	9,95%
(16)	Supplementary pension insurance		[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(17)	Accident insurance		[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(18)	Gross salary		100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
(19)	Unemployment insurance (employee)		3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	3,25%	2,10%
(20)	Pension insurance (employee)		9,30%	9,60%	10,15%	10,15%	9,85%	9,65%	9,55%	9,55%	9,75%	9,75%	9,75%	9,75%	9,95%
(21)	**Civil servant's relative net wage**		87,45%	87,15%	86,60%	86,60%	86,90%	87,10%	87,20%	87,20%	87,00%	87,00%	87,00%	87,00%	87,95%
(22)	Civil servants' wage sum		[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(23)	**Adjusted gross wage sum**	*(22)/(21)*	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(24)	Total revenue		14168	14066	14215	14722	15039	15016	15132	14821	14683	14727	14479	13774	13480
(25)	Non-regulated revenue		[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(26)	Percentage		[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(27)	**Non-regulated services' adjusted wage sum**	*(23)*(26)*	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(28)	Health insurance (Employer's share)		6,44%	6,48%	6,82%	6,82%	6,82%	6,84%	6,78%	7,00%	7,25%	7,15%	6,92%	6,65%	6,95%
(29)	Nursing insurance (Employer's share)		0,50%	0,68%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%	0,85%
(30)	Unemployment insurance		6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	6,50%	4,20%
(31)	Pension insurance		18,60%	19,20%	20,30%	20,30%	19,70%	19,30%	19,10%	19,10%	19,50%	19,50%	19,50%	19,50%	19,90%
(32)	**Benchmark**		**32,04%**	**32,86%**	**34,47%**	**34,47%**	**33,87%**	**33,49%**	**33,23%**	**33,45%**	**34,10%**	**34,00%**	**33,77%**	**33,50%**	**31,90%**
(33)	Employer's share	*(6)*(21)*	17,04%	17,44%	18,25%	18,25%	18,05%	17,93%	17,81%	18,01%	18,36%	18,27%	18,07%	17,84%	17,46%
(34)	Additional pension insurance	*(16)*(21)*	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(35)	Accident insurance	*(17)*(21)*	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(36)	**Effective contribution rate**	***(33)+(34)+(35)***	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(37)	**Relative difference**	***(32)-(36)***	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(38)	**Absolute difference**	***(27)*(37)***	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
(39)	Public subsidy to postal pension fund		151	417	801	941	1118	2819	3023	3071	3154	3018	3010	3092	3013
(40)	**Annual comparative advantage**		[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

Explanatory notes to Table ii

Lines (1) to (17): Data on social contribution rates

These lines present the social contribution rates that have to be paid to the social insurances (decomposed in the employer's and employee's share) by private employers. The last two lines show the contribution rates to the supplementary pension and the accident insurances which Deutsche Post adds in its calculation of the "competitive" social costs (see Table 2).

Lines (18) to (23): Calculation of adjusted gross wage sum

To have a common denominator for the social contribution rates, it is important to note that the private-employee's gross wage is generally defined as net wage plus the employee's share of the social contributions. As civil servants pay 50 to 70 percent of their health insurance out of their own pockets but do not contribute to the pension and unemployment insurance, the civil servant's take-home pay equals the private employee's gross salary (100 percent) minus the employee's share of the social contribution rate for pension and unemployment insurances. This rests on the assumption of a 50 percent contribution to the health insurance by civil servants themselves.

The civil servant's take-home pay expressed in percentage of the private employee's gross wage is given in line (21) for each year and labelled civil servants' relative net salary. To calculate the adjusted gross wage sum for the civil servants, the civil servant's take-home pay is inflated by 1/(relative net salary) as shown in line (23).

Lines (24) to (27): Calculation of the adjusted gross wage sum for the non-regulated services

The civil servants' adjusted gross wage sum in the non-regulated services is approximated by taking the revenue shares of regulated and non-regulated services because the precise number of civil servants who worked for the non-regulated services was not retrievable from Deutsche Post's accounting.

Lines (28) to (32): Calculation of benchmark rate

As it is assumed that civil servants cover 50 percent of their health expenses out of their own pockets, the benchmark rate includes the total contribution rate for pension and unemployment insurance but only the employee's share for health and nursing insurance.

Lines (33) to (36): Calculation of effective contribution rate

The calculation of the effective contribution rates follows Deutsche Post's definition of "competitive" social costs and includes the employer's share of the social contribution rate plus the contribution rates to the supplementary pension and the accident insurances. However, as Deutsche Post multiplied, in its account, the relative net wage (see line (21)) and not the gross wage (see line (18)) by the "competitive" social contribution rate, the effective contribution rate (see line (36)) is lower than the simple sum of the respective statutory rates.

Lines (37) to (40): Calculation of relative and absolute difference

The absolute difference in social costs is calculated based on the adjusted gross wage sum for the non-regulated services. As the absolute difference in the social costs is higher than the pension subsidy in 1995, the annual comparative advantage is capped by the amount of the pension subsidy. For all following years, the annual comparative advantage equals the difference in social costs.